

REMARKS

I. Status of the Claims

Claims 1-6, 8-20, 26-43, and 45-92 are pending in this application and stand rejected. Claim 44 has been canceled herein without prejudice or disclaimer.

Claims 1, 83, 88, and 92 have been amended to recite the subject matter of original claim 44, now canceled, that the "the ratio, by weight, of the at least one C₁₄-C₃₀ alkyl sulphate to the at least one associative polymer ranges from 0.1:1 to 10:1" Support for this amendment can be found in canceled claim 44 and throughout the specification as filed. See paras. [0016]-[0017], and [0173], for example. Claim 45 has been amended to correct dependency on cancelled claim 44. Accordingly, no new matter has been introduced by the present amendment.

Applicants respectfully submit that no new matter has been introduced by the present amendment, nor does the amendment raise new issues or necessitate the undertaking of any additional search of the art by the Examiner.

II. Claim Rejections

A. Cottard in view of Sokol

The Examiner has maintained the rejection of claims 1-6, 8-20, 26-30 and 42-92 as unpatentable under 35 U.S.C. § 103(a) over U.S. Patent Application Publication No. 2001/0023514 A1 to Cottard et al. ("*Cottard*") in view of U.S. Patent No. 3,836,326 to Sokol et al. ("*Sokol*") for reasons of record and those set forth at pages 2-4 of the Final Office Action. Applicant continues to traverse this rejection for reasons of record and the following additional reasons.

In the Final Office Action, the Examiner maintains his assertion that *Cottard*, which teaches compositions for oxidation dyeing comprising, in a dyeing medium, at least one oxidation dye, at least one certain type of thickening polymer, and at least one certain type of fatty alcohol (see Abstract), teaches all the present claim limitations with the exception of a C₁₄-C₃₀ alkyl sulfate. See Office Action of December 5, 2005 at 4. To remedy this failing, the Examiner relies on *Sokol*, alleging that it would have been obvious to modify *Cottard* by incorporating the sodium myristyl sulfate taught by *Sokol*. See Final Office Action at 3. According to the Examiner, this proposed modification would have been obvious because *Cottard* "suggests the use of the genus anionic surfactants of alkyl sulfates in the hair dyeing formulation." *Id.* The Examiner points to page 16, para. [0321] of *Cottard*, where *Cottard* teaches anionic surfactants chosen from, among numerous other things, salts of alkyl sulfates. *Id.* The Examiner then alleges that *Sokol* teaches sodium myristyl sulfate, an alkyl sulfate salt, as a dispersing agent that can accelerate the dispersing of the dyeing ingredients in a composition. *Id.*

Based on these selected disclosures, the Examiner concludes that one skilled in the art would have been motivated to incorporate sodium myristyl sulfate, as taught by *Sokol*, into *Cottard*'s dyeing composition with a reasonable expectation of success because any of the species of the alkyl sulfate genus would have similar properties. *Id.* The Examiner also contends that one skilled in the art would have been motivated to combine these teachings because *Sokol* suggests that sodium myristyl sulfate accelerates the dispersion of dyeing ingredients. *Id.* Applicants disagree for the reasons discussed in detail below.

1. There is no motivation to combine the cited references

To make a prima facie case of obviousness, the Examiner must show that the references provide some suggestion or motivation for the proposed modification and/or combination of their teachings. See M.P.E.P. § 2143. This requirement has not been met by the Examiner here.

In particular, Applicant notes that the at least one surfactant disclosed in *Cottard* is an optional ingredient in the recited dyeing compositions. See p. 16, para. [0317]. Further, *Cottard* teaches that the surfactants are chosen from anionic, amphoteric, nonionic, zwitterionic and cationic surfactants (see p. 16, para. [0318]), and that the anionic surfactants can include salts of alkyl sulfates (see p. 16, para. [0321]), but this disclosure of alkyl sulfate salts is only one in a list of many possible categories of surfactants¹. As for *Sokol*, its disclosed detergent or dispersing agent, such as the alkyl sulfate salts sodium lauryl sulfate or sodium myristyl sulfate, is also optional. See col 4., lines 59-63.

a) *Too many choices have to be made to reach the presently claimed invention from the cited art.*

Thus, in order to even get to the point where one might (for the sake of argument) consider introducing the specific C₁₄-C₃₀ alkyl sulphate of *Sokol* into the composition of *Cottard*, the skilled artisan would have to make *at least* the following choices:

- 1) a choice to use a surfactant in the composition of *Cottard*,

¹ The Examiner makes a statement regarding the fatty acid salts of oleic acid and stearic acid disclosed in *Cottard* as possible anionic surfactants. Final Office Action at 3. The implication is that these are examples of alkyl sulfate salts. This is incorrect, however. These fatty acid salts, although they do contain alkyl portions within the range of C₁₄ to C₃₀, do not contain the -SO₃H function which is a necessary part of a sulfate salt.

- 2) a choice among anionic, amphoteric, nonionic, zwitterionic and cationic surfactants in *Cottard* to use an anionic surfactant,
- 3) a choice within the long list of anionic surfactants in *Cottard* to use a salt of alkyl sulfates.

The need to make so many choices stands in itself as evidence that a prima facie case of obviousness has not been made. *Cottard* discloses hundreds of possible optional surfactants that can be used in its inventive dye compositions. *Paras.* [0317 - 0338]. From these hundreds of surfactants, the Examiner proposes that it would have been obvious to select the salts of alkyl sulfates. In view of the fact that there is no guidance to select the salts of alkyl sulfates, the disclosure of a laundry list of surfactants cannot be used as a basis for an obviousness rejection.

All that can be concluded from *Sokol* and *Cottard* is that it was known at the time of Applicants' invention to use various types of surfactants in a dyeing composition. But there is no suggestion in either reference that one skilled in the art would have selected sodium myristyl sulfate to replace any surfactant, let alone the alkyl sulfate salts so generically disclosed in *Cottard*. When viewed as a whole, neither *Cottard* nor *Sokol* provide any suggestion that the modification suggested by the Examiner would have resulted in an advantageous rather than disastrous dye composition. Rather, in both references the alkyl sulfates are referred to in passing and not in any way that would provide the requisite motivation or suggestion to combine teachings of the two references. Desirability requires much more than a mere mention in a document or acknowledgment that each claim limitation is known. M.P.E.P. § 2143.01.

In order to support a rejection under 35 U.S.C. § 103, “the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would [actively] select the elements from the cited prior art references for combination in the manner claimed.” *In re Rouffet*, 149 F.3d at 1357, 47 U.S.P.Q.2d at 1458 (Fed. Cir. 1998) (emphasis added). The Examiner cannot pick and choose from a reference only the teachings that suit his purpose.

b) *The claimed weight ratio is not taught or suggested.*

In addition, the Examiner contends that the claimed weight ratio of the at least one alkyl sulfate to the at least one associative polymer (as originally recited in claims 44 and 45 and now recited in amended claim 1 and claim 45) would have been obvious because *Cottard* teaches the weight amounts for the associative polymers and *Sokol* teaches amounts of these dyeing ingredients that are “within and/or overlapped with the claimed ranges” of sodium myristyl sulfate. *Office Action dated December 5, 2005*, at 5. Applicants respectfully traverse this rejection.

As discussed above, one of ordinary skill in the art would not have been motivated to combine the teachings of *Cottard* and *Sokol* in the first place. The Examiner again improperly relies on the knowledge of one skilled in the art in lieu of concrete evidence supporting the obviousness of the claimed invention. Moreover, neither of the two references teaches the particular weight ratio between the at least one C₁₄-C₃₀ alkyl sulphate and the at least one associative polymer as recited in amended claim 1. In fact, *Cottard* teaches an amount of thickening polymer ranging from 0.01 to 10% by weight relative to the total composition (see p. 5, para [0108]) and an amount of surfactant ranging from 0.01 to 40% by weight relative to the total

composition (see p. 17, para [0339]), whereas *Sokol* describes an amount of detergent or dispersing agent ranging from 1 to 30% by weight relative to the total composition (see col. 4, line 67 - col. 5, line 2). Therefore, the weight ration between the detergent and dispersing agent and the at least one thickening polymer ranges from 0.1 to 3000 according to the teachings of *Cottard* and *Sokol*.

The currently claimed ratio ranging from 0.1 to 10 represents only 0.3% of the ratios calculated from the values disclosed in *Cottard* and *Sokol*. Consequently, if one skilled in the art had combined *Sokol* with *Cottard*, and if she had chosen to introduce an alkyl sulfate into the composition of *Cottard*, she would have had to make an **additional** choice regarding the ratio. The claimed weight ratio of 0.1 to 10 is too narrow in view of the calculated range to be the result of routine experimentation.

For this additional reason, the rejection should be withdrawn.

B. Cottard in view of Sokol and further in view of Laurent

The Examiner continues to reject claims 31-41 under 35 U.S.C. § 103(a) as unpatentable over *Cottard* in view of *Sokol* and further in view of U.S. Patent Application Publication No. 2002/0046431 to Laurent et al. ("*Laurent*") for the reasons of record. Applicants respectfully traverse this rejection.

The Examiner notes that *Cottard* and *Sokol* fail to teach the claimed cationic amphiphilic polyurethane polymers. *Office Action dated December 5, 2005*, at 5. But, according to the Examiner, *Cottard* suggests the use of associative cationic polymers and *Laurent* teaches a cationic polyurethane similar to the one presently claimed. *Id.* Thus, according to the Examiner, it would have been obvious to one of ordinary skill in

the art to have modified *Cottard* by incorporating *Laurent's* cationic polyurethane because of their respective teachings. *Id.* Applicants disagree.

First, as discussed above, one of ordinary skill in the art would not have been motivated to combine the teachings of *Cottard* and *Sokol*, and *Laurent* as relied on by the Examiner for its alleged teaching of cationic polymers, fails to cure the fundamental deficiencies of the underlying references.

Second, the Examiner again improperly relies on the knowledge of one skilled in the art by contending that it would have been obvious to one of ordinary skill in the art to have modified *Cottard* by incorporating *Laurent's* cationic polyurethane. The Examiner's rationale is so broad that it would encompass essentially the modification of any composition by adding any cationic polymer of *Laurent* for any purpose or no purpose at all. This logic is contradictory to the Federal Circuit's holdings with respect to combining old elements, because the Examiner is taking the position that the combination of known elements is prima facie obvious. *In re Kotzab*, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000) ("[m]ost if not all inventions arise from a combination of old elements.... However, identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention). Thus, for at least the foregoing reasons, Applicants respectfully request that this rejection also be withdrawn.

CONCLUSION

In view of the foregoing remarks, Applicants respectfully request reconsideration and reexamination of this application and the timely allowance of the pending claims.


Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: March 29, 2007

By: _____


Thalia V. Warnement
Reg. No. 39,064